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IN THE

Supreme Court of the United States

October Term, 1963
No. 682

AMERICAN PIPE AND CONSTRUCTION COMPANY, a California Corporation, ROBERT V. EDWARDS, ELLIOTT BRAINARD, UNITED CONCRETE PIPE CORP., a California Corporation, LLOYD EARL, RICHARD I. YOUNG, and GEORGE L. CURTIS,

Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, THE HONORABLE PEIRSON M. HALL, THE HONORABLE LEON R. YANKWICH, Judges of the United States District Court for the Southern District of California, Central Division, BATRIS W. PEROVICH, NORTHWEST PIPE LININGS, a California corporation, INPLACE LININGS, INC., a California corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, THE HONORABLE PEIRSON M. HALL, THE HONORABLE LEON R. YANKWICH, Judges of the United States District Court for the Southern District of California, Central Division, BATRIS W. PEROVICH, NORTHWEST PIPE LININGS, a California Corporation, INPLACE LININGS, INC., a California Corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit, entered November 7, 1963, denying Petitioners' motion for leave to file Petition for Writ of Prohibition and for Writ of Mandate.

Opinions Below.

The United States Court of Appeals for the Ninth Circuit did not write an opinion in connection with the rendition and entry of its Order of November 7, 1963, denying leave to file a Petition for Writ of Prohibition and for Writ of Mandate. The extraordinary writs were sought to compel the vacation of written orders of the District Court for the Southern District of California, entered November 1, 1963 and November 4, 1963. No opinion was written in connection with either such order.

Grounds of Jurisdiction.

Petitioners' motion for leave to file Petition for Writ of Prohibition and for Writ of Mandate was filed with the United States Court of Appeals for the Ninth Circuit on November 7, 1963. The order of the United States Court of Appeals for the Ninth Circuit denying such motion was entered on November 7, 1963. No Petition for Rehearing was filed. This Court has jurisdiction to issue a Writ of Certiorari to the Court of Appeals for the Ninth Circuit in this case under the provisions of Section 1254(1), Title 28 of the United States Code.

Questions Presented.

1. Does the Fifth Amendment privilege not to be compelled in any criminal case to be a witness against oneself require the stay of the taking of depositions, in a civil action, as to one who faces imminent criminal prosecution involving the very same transactions as the civil action?

2. Does the Fifth Amendment's due process clause entitle a defendant in a pending civil action to a stay of proceedings therein until the disposition of a criminal prosecution then being instituted against him when such civil action is based on the same transactions as the criminal prosecution?

3. Is one who is facing imminent criminal prosecution entitled, by reason of the Fifth Amendment's due process clause, to a stay against discovery proceedings in a pending civil action based on the same transactions?

4. Is not the only permissible standard under Rule 30(b), Fed. R. Civ. Proc., that one who is the target of imminent criminal prosecution is entitled to a protective order preventing the taking of his deposition in a civil action which involves the same transactions as such criminal prosecution?

Constitutional Provisions and Rules.

This case involves the following provisions of the Federal Constitution and Rules of Civil Procedure:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."
>
> U. S. CONST., Amend. V.
>
> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."
>
> U. S. CONST., Amend. V.
>
> "*(b) Orders for the protection of parties and deponents.* After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not

be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."

RULE 30(b), FEDERAL RULES OF CIVIL PROCEDURE.

Statement of the Case.

Petitioners American Pipe and Construction Company and United Concrete Pipe Corp. are California corporations engaged in the manufacture and sale of concrete pipe and, to some extent, in the lining and rehabilitation of steel and cast iron pipe in place. Each corporation is a major factor in this industry in the Western part of the United States. The individual Petitioners are officers of one or the other corporate Petitioner.[1]

[1]Petitioner Lloyd Earl is Chairman of the Board of Directors of United Concrete Pipe while George L. Curtis is President and Richard I. Young is Vice-President of that company. Peti-

The corporate Petitioners, together with other companies playing a significant part in these industries in the Western part of the United States, became the object of a Grand Jury investigation into possible violations of antitrust laws about the fourth of October, 1962. In fact, the investigation carried on by the Grand Jury continues investigations commenced by the Anti-Trust Division of the Department of Justice as long ago as 1960. [App. p. 83.][2] The special Grand Jury was impanelled to investigate alleged illegal practices in the concrete and coated steel pipe industries. This Grand Jury has subpoenaed many witnesses and numerous documents, including extensive documents supplied to it by the corporate Petitioners herein in response to several different subpoenas. Petitioner American Pipe and Construction Company supplied nearly 13,000 pages of documents in response to three separate subpoenas, expending nearly 4,000 man hours in compiling them. [App., p. 104.] Petitioner United Concrete Pipe Corp. and its subsidiary produced over 11,000 pages of documents in response to various subpoenas, including detailed tabulations relating to various jobs over a seven-year period. [App., p. 132.] During the same period, some fifteen employees of Petitioner American Pipe and Construction Company have testified under subpoena, and twelve employees of Petitioner United Concrete Pipe Corp. have been sub-

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tioner Robert V. Edwards is President of American Pipe and Construction Company, and Petitioner Elliott Brainard is Executive Vice-President of American Pipe and Construction Company.

[2]Reference herein to "Pet." or to "App." are to the Petition and Appendix filed with the Court of Appeals for the Ninth Circuit on November 7, 1963 and certified to this Court as part of the record herein. Nine copies of each document have been submitted to this Court.

poenaed to testify before the Grand Jury. [App., pp. 102, 130-131.]

Although Petitioners are deeply interested in the course of the investigations of the Grand Jury, their knowledge thereof is, of course, sharply limited by the traditional secrecy surrounding its proceedings. The scope of the Grand Jury investigations, however, is indicated by the various subpoenas *duces tecum* issued by it. [App., pp. 106-125.] The first such subpoenas, dated September 26, 1962, embraced the sale and distribution of pipe used primarily in sewers, water mains and storm drains over an eight-state Western area and compelled the identification of supervisory employees, the submission of price lists, and all documents and correspondence relating to eight specified types of anti-competitive behaviour. The second set of subpoenas, dated May 6, 1963, covered additional products and additional territory. The Petitioner corporations were required by these subpoenas to supply their corporate histories both with respect to the manufacturing of pipe, traced through preceding corporate entities to the time of building of the first pipe manufacturing plant, and with respect to their pipe cleaning, lining and relining activities. Also supplied pursuant to the subpoenas was a total record of acquisitions and plant expansions. In addition, exceedingly detailed information was demanded as to gross sales, production, specific bids in excess of a certain amount, transactions involving the borrowing or leasing of facilities or licensing with competitors, and extensive additional information about other transactions over a six-year period beginning January 1, 1957.

The third set of subpoenas, dated September 27, 1963, required detailed information to fill out the Grand Jury's comprehensive picture of the structure and history of these industries, built up of the documents theretofore required. The burden of compliance with these subpoenas on corporate and individual Petitioners, together with the anxiety naturally generated by the pendency of the investigation, has weighed heavily. Petitioners are persuaded that, during the course of this investigation and before September, 1963, the Grand Jury had made up its mind to indict the parties subject to investigation and that the Petitioners, both corporate and individual, might properly apprehend that they have ceased to be mere witnesses in respect to these investigations and have become "target defendants" therein. [App., p. 82.]

Convinced that they had become target defendants, the corporate Petitioners herein together with other companies in the industry, became concerned at the delaying tactics of the Grand Jury; for the Grand Jury, after receiving extensive testimony and documentary evidence between October, 1962, and the first part of July, 1963, called no further witnesses and subpoenaed no further documents throughout the summer months. [App., pp. 102-103.] Fearing that they would be caught in the whipsaw of civil discovery proceedings and the continuing probe of the Grand Jury, these companies moved the District Court to discharge the Grand Jury for abuse of its function. [App., pp. 81-82.] An adequate showing of such abuse was apparently made out, since the District Court, by Order dated September 17, 1963, advised the Grand Jury of the probability of its discharge on failure to indict or re-

turn a no-bill on or before October 14. [App., pp. 99-100.] Subsequent proceedings in this connection have included a Petition in the Court of Appeals for the Ninth Circuit on behalf of the United States asking extraordinary relief from the threatened discharge; and this application is pending before that Court.[3]

In March and April, 1963, some six months after the commencement of the Grand Jury proceeding, three private treble-damage actions, each based on Section 4 of the Clayton Act, 15 U. S. C. §15, were commenced, naming as defendants numerous corporations subject to the investigation, including the two corporate Petitioners herein.[4] The three complaints are substantially identical. The plaintiff in the first action is Batris W. Perovich; in the second, his 60% owned corporation, Northwest Pipe Linings; in the third action, a Texas corporation, Inplace Linings, Inc. The same law firm, and indeed the same lawyer, represents the plaintiff in each of the three actions. [App., p. 66.] In addition, this attorney owns a 10% stock interest in Northwest Pipe Linings. [App., p. 66.] Both the plaintiff Perovich and his attorney have testified before the Grand Jury, Perovich several times. [App., p. 66.] At least some, if not all, such appearances preceded commencement of these actions. [App., pp. 33, 66.]

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[3] *United States v. District Court, et al.*, U. S. Court of Appeals for the Ninth Circuit, No. 18985, 1963 Term. After the trial court vacated all prior orders in this regard, the Court of Appeals, on December 5, 1963, denied the relief sought by the United States.

[4] *Batris W. Perovich v. Pipe Linings, Inc. et al.* (Southern District of California, Central Division, No. 63-278); *Northwest Pipe Linings v. Pipe Linings, Inc. et al.* (Southern District of California, Central Division, No. 63-279-Y); *Inplace Linings, Inc. v. Pipe Linings, Inc. et al.* (Southern District of California, Central Division, No. 63-321-Y).

As can be seen by the Grand Jury's subpoenas, the scope of its investigation includes certain suspected practices in the pipe industry throughout the Western United States, and concerns the fixing of prices, allocation of customers, market and bids, allocation of pipe sizes for production and lining of pipe in place, and allocation of losses suffered from bids made below cost. Just such transactions form the basis of the three private treble-damage actions.

The amended complaints in each of the three private actions are substantially similar in almost all respects. In each the defendants are the same; in each the alleged violations of law are substantially identical; in each treble damages are sought based on such alleged violations. [Pet., pp. 3-4.] Accordingly, an analysis of the *Perovich* amended complaint will serve to set forth the gist of all three private actions. That complaint attempts to state two causes of action. The first alleges a conspiracy to divide the business of in-place rehabilitation of steel and cast iron pipe in place within the State of California and further alleges an agreement to apportion the taking of contracts below cost, so as to spread the losses incurred thereby among the defendants. The allegations of the second cause of action attempt to set forth a conspiracy involving the corporate Petitioners and others aimed at the allocation and division of the manufacturing and sale of concrete pipe in six Western states, a second conspiracy with still other companies to achieve the same end in three additional Western states, and a further conspiracy embracing all nine states designed to allocate the total pipe business as between inplace rehabilitation and the sale and installation of new concrete pipe. [App.

pp. 1-15.] The transactions, the alleged violations of law, the products, the areas, and the alleged violators are those shown equally to be included within the sweep of the Grand Jury investigation and to be the subject of the claims of the *Perovich* case and its two companion cases.

The amended complaints in these private actions were filed in June, 1963. Prior to that time depositions of some of the Petitioners herein had been noticed by the plaintiff Perovich. In May, 1963, such depositions were reset to begin on September 10, 1963, by order of the Court, entered pursuant to stipulation of counsel. [App., p. 34.]

About this time, the plaintiff Perovich took the deposition of a nonparty to the action. The only defendant to initiate discovery proceedings in these actions is one who is not a Petitioner here; no Petitioner before this Court has initiated any discovery proceedings in any of these private actions.

On August 29, 1963, Petitioner United Concrete Pipe Corp. moved the stay of discovery in each of the three private actions. [App., pp. 16-17.]. The motion was based, in part, on the pendency of motions to dismiss the amended complaints and, in part, on the fact that the "defendants are members of an industry which has been under investigation by a Federal Grand Jury in this District for the past year." [App., pp. 16-17, 22-23.] In response to this motion, Judge Yankwich first refused the stay [App. pp. 38-39], but thereafter modified his order to continue depositions "until this Court has ruled on . . . Motions to Dismiss. . . ." [App., pp. 40-41.] In fact, Judge Yankwich had indicated that

he would postpone decision on the motion to stay discovery proceedings until after decision on the motions to dismiss. [App., pp. 44-45.]

On Friday, November 1, 1963, Judge Yankwich signed an order denying the motion to stay discovery and setting depositions of the five individual Petitioners to commence November 13, 1963. [App., pp. 45-d-45-f.] Thereafter, on Monday next, motions were made in each of the three private actions for an order under Rule 30(b), Federal Rules of Civil Procedure, staying and continuing the scheduled depositions. [App., pp. 46-74.] After argument on these motions, Chief Judge Peirson Hall denied the relief requested on the same day by an order dated November 4, 1963. [App., pp. 75-76.]

Both the motion to stay discovery and the motion for a protective order under Rule 30(b) alleged the status of the individual Petitioners as target defendants of the pending Grand Jury investigation and the high probability that all questions asked in such depositions would call for incriminating answers, for the individual Petitioners are important officers of the corporate Petitioners. The individual Petitioners, Curtis and Brainard, had testified before the Grand Jury and had acquired, under the special anti-trust immunity statute, 15 U. S. C. §32, an immunity from prosecution of untested scope. The other individual Petitioners cannot rely upon this provision at all. All have a right to look askance at questioning in the civil actions.

Realizing the seriousness of the threatened depositions, the individual and the corporate Petitioners sought relief under the All-Writs Statute, 28 U. S. C. §1651.

in the Court of Appeals for the Ninth Circuit by way of mandamus. Motion for leave to file a petition for such relief was filed, argued, and decided adversely to the Petitioners, all on November 7, 1963. Review of this denial sought hereby has not become moot by virtue of a stay of the scheduled depositions granted by Mr. Justice Douglas pending determination of this petition for writ of certiorari.

Reasons for Granting the Writ.

First and foremost, Petitioners emphasize that their claim raises serious and far-reaching constitutional questions which ought to be, but never have been, decided by this Court. Petitioners' claim is that they are constitutionally entitled as target defendants in a criminal proceeding to have the scheduled depositions called off until the disposition of the criminal proceeding. Several separate constitutional rights all converge to this result. The individual Petitioners' privilege against self-incrimination should, in the present circumstances, foreclose the holding of these depositions. All Petitioners, having the status of target defendants in this prolonged Grand Jury proceeding, are entitled, as a matter of basic due process, to insist upon the delay of these parallel civil actions until the criminal proceeding is disposed of. This Court's consideration of this case is fully justified not only by the serious nature of the threatened invasion of Petitioners' constitutional rights, but also by the appearance of the same questions in every case in which civil and criminal sides of a single fact-pattern are simultaneously prosecuted.

(a) The Privilege Against Self-Incrimination.

The provision of the Bill of Rights is that no person shall be compelled in any criminal case to be a witness against himself. This Court, in defense of this important right, has often been called upon to define in various circumstances what it means to be a witness against oneself. More and more, under the influence of this Court's decisions, the *constitutional* right has emerged from a number of related rules of evidence. See 8 WIGMORE, EVIDENCE, § 2251 (McNaughton REV. 1961); *cf.* MAYER, SHALL WE AMEND THE FIFTH AMENDMENT, pp. 171-232 (1959).

> "The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."
>
> *Counselman v. Hitchcock*, 142 U. S. 547, 563 (1892).

In *Counselman v. Hitchcock*, for example, this Court rejected an attack on the claim of the privilege in Grand Jury proceedings at a time when the importance of those proceedings was growing with the importance of an expanding Federal criminal jurisdiction. Again, in the face of the sudden increase in the importance of legislative investigations, this Court insisted on the ready availability of the privilege. *Quinn v. United States*, 349 U. S. 155 (1955); *Emspak v. United States*, 349 U. S. 190 (1955). And the lower courts, anticipating the action of this Court and adumbrating the claim advanced in the present case, have held that

in some circumstances an individual dragged into the public glare of a legislative investigation occupies a position

> ". . . virtually that of an accused upon trial [which] relieves his blanket refusal [to answer *any* question] of the capricious and contemptuous implications which it would otherwise bear."
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> *Marcello v. United States,* 196 F. 2d 437, 441 (5th Cir. 1952).

Petitioners now ask this Court to declare that the meaning of the privilege against self-incrimination, in the circumstances here presented, is that individuals threatened with imminent criminal prosecution may not have their depositions taken in civil actions involving precisely the same issues until the final disposition of such criminal prosecution. From a comparison of the complaints in the civil actions with the scope of the Grand Jury investigation, it is obvious that to compel these individual Petitioners to answer any questions would be to violate their privilege against self-incrimination. From this it follows that their depositions may not be taken. The right demanded has not been passed on by this Court. The question is a novel one. The lower courts, and this Court, in considering more or less analogous situations, may have reached diverse conclusions, but the cases, on analysis from several points of view, indicate the basic correctness of the result Petitioners claim.

Our starting point is that the privilege against self-incrimination is a protection against a real, and not a remote, danger of incrimination. To accord the privilege, the courts must be able to measure the quantum

of danger the privilege is to protect against in each situation in which it is claimed. Measures of the danger have emerged in several contexts.[5]

The danger of self-incrimination has been measured in terms of the answer to be elicted by a specific question; but it has also been measured, generally, in terms of the likelihood, *in the particular procedural setting*, that any questions which may be asked will be of an incriminating nature. Courts, perhaps, have not explicitly realized they were measuring the danger of self-incrimination in this sense when they have devised the various specific procedural rules by which the constitutional right is to be claimed in different types of proceedings. In all judicial and quasi-judicial proceedings, there is a general expectation that every person shall be subject to testimonial compulsion. But there is also, in every such proceeding, a possibility of incrimination which will evoke the constitutional privilege. The result is that procedural rules must be worked out which will be adequate to protect the privilege, so that the procedure neither unduly weakens testimonial compulsion nor (more importantly) constitutes any serious threat

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[5]One such context requires the danger of incrimination to be measured in terms of the "sovereign" who will prosecute Applied to our federal-state relationships, this question has long troubled this Court and is apparently before it once again this term in *Murphy v. New York Harbor Comm'n*, No. 138, October Term, 1963. Another measure of the danger of incrimination is how directly the information attempted to be elicited will incriminate. It is clear that incrimination in any degree is a danger to be protected against: the privilege may be claimed as to answers amounting to an admission of crime, answers tending to prove crime and even answers merely giving leads to other evidence of crime. See *United States v. Burr*, 25 Fed. Cas. 38, 40 (C.C.D. Va. 1807); *Counselman v. Hitchcock*, *supra* 564-65 (1892); *Hoffman v. United States*, 341 U. S. 479 (1951).

to the full enjoyment of the privilege. Such rules must be especially tender of the privilege in light of the doctrine of the waiver of the privilege which has been worked out in some cases.[6]

The courts have tended to provide, on a roughly graduated scale, for different procedures as the likelihood of being asked were incriminating questions increases. The rule can be stated, that as the danger that incriminating questions will be asked increases, the devices to assure that the privilege will not be knowingly waived must be made more protective.

On any such scale, the individual Petitioners' situation should call for the most complete protection. Only in the criminal case itself would the probability that each answer and each question will prove incriminating be as great as it will be in these depositions. And here, too, as in the criminal case, the Respondents cannot hope to get any relevant information in these depositions over the claim of the privilege. Moreover, the Respondents are not losing *forever* their right to get this information, for that right will reappear after a determination on the merits in the criminal proceeding.

The thrust of the Grand Jury's investigations of the corporate Petitioners is repeated in the form of allegations of accomplished violations of law in the private complaints. Among the reasons why a defendant may not be called in a criminal prosecution against himself is surely the fact that no relevant question could be asked of him which might not tend to incriminate, with

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[6] *Arndstein v. McCarthy*, 254 U. S. 71 (1920); *Rogers v. United States*, 340 U. S. 367 (1951); *United States v. Brown*, 356 U. S. 148 (1958).

the result that his questioner could have no legitimate interest in calling him. See 8 WIGMORE, EVIDENCE § 2268(a) (McNaughton Rev. 1961). So here, since the Respondents can hardly hope to elicit from these individual Petitioners any evidence useful in their cases which would not be subject to the claim of the privilege,[7] there can be no legitimate reason for the *taking* of the depositions. The truth is that where, as here, there is a probability approaching moral certainty that every question is incriminating, the taking of depositions ceases to be an instrument of civil recovery; it becomes rather a tool handy for harassment, for collusion with the Government's investigation, and for oppression. The taking of Petitioners' depositions will result in nothing of much use to the plaintiffs, but will create an extreme risk for the Petitioners. Where the reality of the danger is clearly brought home, the constitutional privilege means a complete protection against questioning by forbidding the taking of the depositions; piecemeal protection against repeated questions, each of which is foreknown to trespass on forbidden territory, is not enough. The mere possibility that the answer to a few relatively meaningless questions would be obtained is insufficient. *Maffie v. United States*, 209 F. 2d 225, 231 (1st Cir. 1954).

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[7]This remains the case, although Petitioners Brainard and Curtis have whatever immunity flows from their having testified before the Grand Jury. That immunity will not protect them as to matters not the subject of such testimony. This uncertainty of the scope of the immunity is, itself, it is submitted, sufficient to assimilate their position to that of the majority of the individual Petitioners herein, namely, that of persons intimately involved in claimed violations of law and apprehending accusations with respect thereto. Besides, respondents have never made any claim based on a possible immunity to be accorded to Petitioners Brainard and Curtis.

These, in fact, were the considerations which moved the Court of Appeals for the Fifth Circuit in *Marcello v. United States, supra*, to liken Marcello's position before a legislative investigation to that of a criminal defendant. Based on this analogy, it approved his adhering to his intention, expressed once and for all at an early point in the questioning, that he would refuse to answer all question other than those calling for his name and his address despite the fact that the Committee thereafter insisted on asking 166 specific questions. An analogous principle would seem to be behind the Court's holding in the *Yates* contempt case, in which Justice Clark said that it was

> "... clear that the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers."
>
> *Yates v. United States*, 355 U. S. 66, 73 (1957).

From another point of view, the privilege has been implemented differently in different types of proceedings, according to rules evolved during the course of history. The effect of historical accidents on such rules must be clearly seen for what they are, for such accidents have served to distort, in some cases, the true function of these rules.

The hand of history is especially evident in the form in which the privilege is accorded to a criminal defendant during the course of his criminal trial. His protection is complete: He may not be asked any question; he may not be called as a witness; his failure to become

a witness may not be commented upon.[8] The significance of the history of the development of these rules relating to criminal defendants, however, is that each such rule was called into existence by a concern for preserving the Fifth Amendment rights of the Defendant. In the case of the criminal defendant, it may truly be said that the constitutional privilege had to be applied *de novo* without benefit of a direct common law background, since it was not until the middle of the nineteenth century that the criminal defendant was relieved of his complete disability to testify. See *Ferguson v. Georgia*, 365 U. S. 570, 577-583 (1961). At that time, Congress (Act of March 16, 1878, 20 Stat. 30) arrived at a solution which allowed the criminal defendant to testify without diluting his privilege. For, as Mr. Justice Brennan has said:

> "The lag in the grant of competency to the criminally accused was attributable in large measure to opposition from those who believed that such a grant threatened erosion of the privilege against self-incrimination and the presumption of innocence."
>
> *Ferguson v. Georgia*, 365 U. S. 570, 578 (1961).

The other conventional category of privilege is the right of the witness as opposed to that of the criminal defendant. This category, too, has its history, for it is *the* common law privilege. It was developed for, and is serviceable in, the situation where incriminating ques-

[8] Model Code of Evidence, Rule 201 (1942); 18 U. S. C. §3481; *Adamson v. California*, 332 U. S. 46, 50 n. 6 (1947); *Ferguson v. Georgia*, 365 U. S. 570 (1961).

tions would only be put to a witness fortuitously and occasionally during the course of an unrelated proceeding.[9]

Although, however, history has affected the development of the privilege, it should not be allowed to crystallize its applications into rigid categories. The privilege is not to be defined as a "defendant" privilege and a "witness" privilege, but is to be formulated in a functional manner so as to accomplish the constitutional result in each type of situation as it arises.

When the testimonial disability of criminal defendants was removed, Congress fashioned a conscious, knowing and novel formulation of the privilege. That this formulation, today's "defendant" privilege, was given by Congress showed that it realized no piecemeal application of the old common law privilege would meet the needs of the new situation. This functional application of the principles embodied in the privilege to a particular situation has been reinforced by liberal construction of the Congressional enactment in this Court.[10]

In other novel situations, new procedural formulations of the privilege have been felt to be needed. Such a situation is that of the witness before a Grand Jury who apprehends early indictment. Such a person clearly needs some special help or his Fifth Amendment rights will be diluted. The cases seem to recognize this, but

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[9]In such a proceeding there is little likelihood in the ordinary course of things, that an incriminating question will arise. The common law privilege, apparently, was not always adequate even in these circumstances to protect witnesses. It did not, for example, extend to every form of civil proceeding, although clearly the *constitutional* privilege does so extend. *McCarthy v. Arndstein*, 266 U. S. 34, 41 (1924).

[10]See, *e.g.*, *Stewart v. United States*, 366 U. S. 1 (1961); *Grunewald v. United States*, 353 U. S. 391 (1957); *Wilson v. United States*, 149 U. S. 60 (1893).

their formulation of relief has often been handicapped by an unfortunate conceptualism. Some federal cases, for instance, have refused to protect against Grand Jury questioning of an individual, even where it is clear that the prosecutor has already made up his mind to seek an indictment. In such circumstances, the only possible purpose in calling the individual is the hope that he will fail, through ignorance or otherwise, to claim his privilege. These courts have failed to focus on this crucial fact and instead have denied relief on the technical ground that the individual in such circumstances was not a "defendant" since he had not been actually charged or indicted.[11] Even through this veil of conceptualism, other federal courts and courts of several states have reached a fairer conclusion. In these cases, the conceptual objection has been overcome by concluding that the individual is *de facto* a defendant.[12] In a few other cases, relief has been accorded at least where the individual, before being brought before the Grand Jury, has been "lucky" enough to have been arrested, or charged in an earlier indictment, or the subject of a complaint.[13]

In recent years, however, the lower federal courts have been showing more and more signs of abandoning such categorization and of focusing on the truly im-

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[11]See, *e.g.*, *United States v. Benjamin*, 129 F. 2d 521 (2nd Cir. 1941); *United States v. Price*, 163 Fed. 904 (C. C. S. D. N. Y. 1908).

[12]See, *e.g.*, *United States v. Edgerton*, 80 Fed. 374 (D. Mont. 1897); *People v. Steuding*, 6 N. Y. 2d 214, 160 N. E. 2d 468 (1959); *cf. State v. Naughton*, 221 Mo. 308, 120 S. W. 53 (1909);

[13]*United States v. Lawn*, 115 F. Supp. 674 (S. D. N. Y. 1953), *aff. dism.*, 208 F. 2d 467 (2nd Cir. 1953); *Mulloney v. United States*, 79 F. 2d 566, 578-580 (1st Cir. 1935).

portant question, namely, does the increased risk of losing the privilege entitle the individual to additional procedural protection. So Judge Medina, in dealing with this question, has said in a recent case:

> "If, as and when the question, whether the bundle of rights in the Fifth Amendment includes that of a defendant, already charged as by indictment, to a warning when subsequently called to testify before a Grand Jury, is squarely before us, it seems not unlikely that reasons other than the distinction between parties and mere witnesses . . . may convince us that, under certain circumstances or absolutely, a warning is required."
>
> *United States v. Scully*, 225 F. 2d 113, 116 (2nd Cir. 1955).

The need for this functional approach has been deeply felt in one other situation at least. Denaturalization and deportation cases, an especially tender area of litigation, see *Schneiderman v. United States*, 320 U. S. 118 (1943), have given rise to serious judicial concern that special steps be taken to assure the full scope of the privilege to defendants therein. See *United States v. Mathes*, 247 F. 2d 378 (2nd Cir. 1957), *rev. on other grounds*, 356 U. S. 256 (1958), where a court of appeals denied the right of the defendant in a denaturalization proceeding to refuse to appear for a deposition. Judges Lumbard and Waterman were of the opinion that such proceedings were "not sufficiently criminal in their nature." Judge Clark, however, said:

> "I have had more doubts because this type of case has been distinguished from ordinary civil actions for certain purposes, e.g., Schneiderman v. United

States, supra, 320 U.S. 118, 125, 63 S.Ct. 1333, 87 L.Ed. 1796; Baumgartner v. United States, supra, 322 U.S. 665, 670, 64 S.Ct. 1240, 88 L.Ed. 1525; United States v. Minker, supra, 350 U.S. 179, 197, 76 S.Ct. 281, 100 L.Ed. 185 (concurring opinion of Justice Douglas); *because the issues in this case are so close to those involved in a prosecution under the Smith Act, 18 U.S.C. §2385, or the Internal Security Act, 50 U.S.C. §§843, 855, that identical treatment of the constitutional issue here with what would be accorded in such a prosecution seems not unreasonable;* and because one who takes the stand must play a dangerous game of properly timing his claims of privilege to avoid both contempt and waiver. . . .

"This important issue must of course await final settlement by the Supreme Court. . . ." (Emphasis added.)

United States v. Matles, 247 F. 2d 378, 381-382.

These views go much further than the claim being made by the individual Petitioners here, for, so far as appears, no criminal action was pending or imminent in the *Matles* case. See also *United States v. Costello*, 144 F. Supp. 779 (S. D. N. Y. 1956).

Under the cases discussed the argument may well be made that at some point the likelihood that the privilege will be claimed may make the mere act of calling the witness an idle or, perhaps, malicious gesture, even in the "ordinary civil case." The individual Petitioners' case represents this situation taken to an extremity. Here, it is a moral certainty that no real information

can be gotten by the plaintiffs over the claim of the privilege. Here criminal prosecution is not a mere possibility, but a fact aborning.

The individual Petitioners should not be required to appear for the depositions and to assert the privilege on a question-by-question basis. Having to show up is more than a mere formality. First, these individual Petitioners would then, without good reason therefor, undergo the risk of convicting themselves, in whole or in part, merely because they or their counsel fail to see the incriminating bite of apparently innocuous questions. At the depositions, they would be forced, at their peril, to choose the risk of contempt, the danger of waiver, or the act of self-incrimination which is "abhorrent to the instincts of an . . . American." *Boyd v. United States*, 116 U. S. 616, 632 (1886). There is yet more to fear from showing up at the depositions, for Petitioners' demeanor or their response to particular questions may stimulate new lines of inquiry, directly or indirectly, by the Government. Most important of all, the claim of the privilege must thereafter stand an ultimate test, on a specific question-by-question basis, at a hearing before a judge, *and all other interested persons*, in open court, where the ingenuity of Petitioners' own counsel must be exercised to show the incriminating nature of the questions. These consequences show that where, in fact, it is foreknown that the questions will almost all call for incriminating answers, the mere holding of the deposition will dilute the proper scope of the privilege and change a civil discovery proceeding into an indirect and illegal tool available to the Government.

All that is left is to show that Petitioners' claim is a reasonable means of giving Petitioners adequate protection. The court may shift the burden of claiming the privilege as one means of providing the necessary protection. This was the result, we offer, in *Quinn v. United States*, 349 U. S. 155, 166 (1955). The situation of an individual who has become a target or a *de facto* defendant in a Grand Jury investigation calls out for special protection. The courts have applied several methods to achieve that protection. The lower Federal courts seem to be moving in the direction of protecting the privilege by shifting the burden of claiming it from the target defendant to the prosecutor.[14] Other lower Federal courts have gone even further and found another mode of protection. In *Connelly v. United States*, 249 F. 2d 576, 581 (8th Cir., 1957), a trial judge's suppression of all testimony given by prospective defendants before a Grand Jury from the point in time at which the prosecutor had decided to seek indictments against them was characterized by the appellate court as "eminently fair."

Other courts, including those of the State of New York,[15] have provided complete protection by concluding that a target defendant can no longer be called by the

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[14]The shift in the burden is accomplished by requiring a full and complete warning to be given. See *United States v. Lawn*, 115 F. Supp. 674 (S. D. N. Y. 1953), *app. dism.*, 208 F. 2d 467 (2d Cir. 1953); *cf. United States v. Cleary*, 265 F. 2d 459 (2d Cir. 1959); *United States v. Scully*, 225 F. 2d 113, 116 (2d Cir. 1955). As Judge Goddard has said, "[t]he law grants him this protection." *United States v. Lawn*, *supra*, 677.

[15]*People v. Steuding*, *supra*; *People v. Bermel*, 71 Misc. 356, 128 N. Y. Supp. 524 (S. Ct. 1911); *People v. Gillette*, 126 App. Div. 665, 111 N. Y. Supp. 136 (1908); *Annot.*, 38 A. L. R. 2d 225, 238 (1951).

Grand Jury. The Petitioners seek no greater relief than this. In fact, they seek less because they have not found it necessary to attack the special institutional position of the Grand Jury.[18]

In the present circumstances, with criminal prosecution looming and delay in taking these depositions not being a burden on the plaintiffs, imposing on these individual Petitioners the ordinary "witness" burden deprives them, *in toto*, of the benefit of the privilege because it imposes on them a heavy burden without regard to the fact that the only information to be elicited at such a deposition is information involving the possibility of crime. Such a niggardly view of the privilege does not accord with its high place in the Bill of Rights:

> "Coequally with our other constitutional guarantees, the Self-Incrimination Clause 'must be accorded liberal construction in favor of the right it was intended to secure.' Such liberal construction is particularly warranted in a prosecution of a witness for a refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose."
>
> *Quinn v. United States*, 349 U. S. 155, 162.

The courts of several states have given a full enforcement to the privilege against self-incrimination in the same circumstances as those presented here. The courts of New York have repeatedly quashed the holding

[18] *Cf. Costello v. United States*, 350 U. S. 359 (1956).

of an examination where the information sought to be elicited would tend to incriminate.[17] In *Re Charles Green*, 86 Mo. App. 216 (St. Louis Ct. App. 1900), the petitioner Green was seeking a writ of habeas corpus. He had been committed to jail for contempt upon his refusing to be sworn for the purposes of taking his deposition. The matter involved was a proceeding to discover secreted property during the administration of an estate which had commenced with the claim that the petitioner had embezzled funds, proceeded to interrogatories and denials thereof on the same claim, and was at issue on such claims and their denial. The court held that it was not contempt for the petitioner to refuse to be sworn because he could not be compelled to submit to examintion.[18]

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[17]See, *e.g.*, *Baar v. United States Fidelity & Guaranty Co.*, 206 App. Div 412, 201 N. Y. S. 391 (1923); *People's Coat Apron & Towel Supply Co. v. Light*, 168 App. Div. 142, 153 N. Y. S. 330 (1915). Subsequently, in *Heit & Weisenthal v. Licht*, 218 App. Div. 753, 218 N. Y. S. 102 (1926), and cases following it, New York adopted a harsher rule.

[18]"The interrogatories propounded to Green are in groups of three or four questions and in each group he is asked if he has not embezzled or concealed the things described in that group. To all of the interrogatories he has answered denying that he has . . . any of the assets. . . . In this state of the record it is apparent that if he has the assets or any of them, he has embezzled and is secreting them, and that this is the real issue which the jury will have to try. . . . And though not in name or form a criminal investigation, it is so in character, and the verdict, if for the estate, must be one of *conviction*. R. S. 1899, section 77. To make out a case for the estate under the condition in which we find the interrogatories and answers thereto, it will be incumbent on the administrator to adduce evidence proving or tending to prove that Green has embezzled some of the assets described in the interrogatories. From making out such a case against himself, from furnishing a link in a chain of evidence leading to his conviction, and from furnishing any information by which evidence might be obtained tending to convict him, Green is protected by the Constitution, according to all of

In the present circumstances, where the civil action is based on allegations which, if true, constitute a crime, where the deponents can only be questioned about their involvement with the alleged facts, and where the deponents are facing imminent prosecution in respect to just such alleged facts, it should be the requirement of the Fifth Amendment that such depositions be stayed until the imminent criminal prosecution is disposed of. Ultimately, such a rule will have the beneficial effect of reducing those situations in which plaintiffs in such parallel civil actions will attempt to force the taking of such depositions with the necessary effect of embarrassing the deponents in the serious and difficult business of preparing for the defense of a Government prosecution.

(b) Due Process Rights of All Petitioners.

Petitioners have made, at some length, the claim that the rights of the individual Petitioners under the Fifth Amendmant entitled them to refuse to appear for the taking of the scheduled depositions in these civil actions patently parallel to the imminent criminal proceedings. All the Petitioners here, both corporate and individual,

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the authorities, as much so as if he was being prosecuted under an indictment charging embezzlement of the assets. . . He is not in the same situation as a witness in an ordinary civil suit, who, to claim his protection, must first be sworn as a witness, and then when a question is propounded to him, that to answer would criminate or tend to criminate him, must so declare under oath and invoke the protection of the law. But, as before stated, Green's situation as a witness is analogous to that of a defendant in a criminal suit by indictment or on information. He may or may not testify as he elects. He can not be called by the opposite party as a witness, nor sworn as such, unless he voluntarily offers himself to be sworn. When he refused to be sworn as a witness, he exercised a constitutional right, and is entitled to his discharge under the writ of *habeas corpus*." *In re Green*, 86 Mo. App. 216, 221-222.

may also rely on a broader and more comprehensive constitutional right—the Fifth Amendment's guarantee of due process. All these Petitioners are subject to imminent criminal prosecution. They are entitled to demand that the judicial processes shall not be used to harass, embarrass and interfere with their preparation for such criminal prosecution by the vexatious activity of the plaintiffs in pushing their civil actions which parallel the criminal prosecution. The principle involved here is one of wide application; it should govern a broad spectrum of cases where a civil action closely parallels a criminal prosecution. Some examples of this, in addition to the antitrust situation here presented, are actions by an insurer to avoid life, fire or theft insurance which go hand in hand with prosecution for murder, arson or fraud; actions to recover public or private monies which go hand in hand with prosecution for embezzlement, fraud, extortion or bribery; actions to terminate employment status which may parallel prosecutions for alleged malfeasance or misfeasance of office; and suits to deprive persons of their citizenship or to deport them which may keep step with prosecutions for numerous crimes made the basis of such action. In some such cases, the prosecutor may be at his election to choose a civil or criminal remedy; in other cases the prosecutor and the plaintiff may be different persons although, of course, they may "cooperate" with each other; but in all such cases the possibility is present of duplication of actions, of doubling of burdens, of multiplication of accusations at a time—namely, when a criminal charge is alleged against one—when the Fifth and Sixth Amendments to our Constitution contemplate the most solicitous care to protect one's rights and to free one from all unnecessary burdens.

Such a multiple attack often has, as its aim or effect, the gathering of evidence outside the procedures of criminal law. *Cf. Campbell v. Eastland*, 307 F. 2d 478 (5th Cir. 1962); *United States v. Bridges*, 86 F. Supp. 931 (N. D. Cal. 1949). At any rate, the possibility of massive and excessive demands upon the resources, energy and attention of one so beset is obvious.

The general due process clause grants certain minimum protection against overburdening a person subject to criminal prosecution. *Cf. Griffin v. Illinois*, 351 U. S. 12 (1956); *Alcorta v. Texas*, 355 U. S. 28 (1957). The due process clause may not protect against the prosecution of every civil action while a person is subject to a criminal prosecution. However, when the civil action being pressed ahead of the criminal prosecution involves the very same facts as the criminal prosecution, the burden, the embarrassment and the interference is not only a cumulative matter. Because the two proceedings, criminal and civil, involve disparate burdens of proof, canons of evidence, and very different consequences, the effect of such early prosecution of the civil suit may force the defendant into positions which he need not take in either suit where the criminal action is first disposed of.

The criminal prosecution will usually be disposed of first because the Constitution requires a speedy trial in criminal actions. Such a speedy trial may, itself, be interfered with, for pushing the civil action may embarrass the prosecutor in the criminal proceeding as well as the defense. In either case, however, there can be no question which interest, the public or private, is paramount.

> "But these distinctions [between private interests in civil litigation and the public interest in

> a criminal prosecution] do not mean that a civil action and a criminal action involving the same parties and some of the same issues are so unrelated that in determining good cause for discovery in the civil suit . . . . , the trial judge in the civil proceeding should ignore the effect discovery would have on a criminal proceeding that is pending or just about to be brought. The very fact that there is a clear distinction between civil and criminal actions requires a government policy determination of priority: which case should be tried first. Administrative policy gives priority to the public interest in law enforcement." *Campbell v. Eastland*, 307 F. 2d 478, 487.

Giving a pre-emptive effect to a pending criminal action, as a requirement of due process, will not harm any legitimate interest of prospective plaintiffs in actions paralleling criminal proceedings. Such plaintiffs, in fact, are usually best served by making use of the facts discovered by the powerful investigative activities of the Government and the results of its prosecution. Such is certainly the case with respect to private antitrust plaintiffs. They look forward to receiving the benefit of Section 5 of the Clayton Act, 15 U. S. C. § 16. Indeed the innumerable situations in which a civil action parallels criminal charges, and the absence of any clear-cut authority in this field, leads one to the inevitable conclusion that, as a matter of practice, the prosecution of a criminal charge has the effect of staying all proceedings in any parallel civil action then on file. To find that such a result is part of the Bill of Rights is only to say that ordinary good sense and common fairness are values to be found here.

(c) Federal Rules of Civil Procedure.

The constitutional claims heretofore set forth are serious ones which justify this court in taking jurisdiction of this case. But this court has also an obligation to supervise the activities of the federal judiciary and to assure that no court—appellate or trial—far departs from the accepted and usual course of judicial proceedings. Leaving aside the constitutional dimensions of petitioners' claim, there still remains an extremely important question as to the administration of the Federal Rules of Civil Procedure as they relate to discovery proceedings in cases like the present one. The circumstances set forth clearly establish that it was an abuse of discretion for the trial judge to refuse a protective order under Rule 30(b), Federal Rules of Civil Procedure, staying these scheduled depositions. In refusing to exercise its corrective powers, the Court of Appeals for the Ninth Circuit sanctioned this abuse of discretion, although it was clear that it had jurisdiction to correct it.[19] Petitioners sought the stay of the scheduled depositions because they would be seriously harmed by the taking thereof. Their constitutional rights would be endangered, and their heavy burden in preparing for likely criminal prosecution unfairly increased. The plaintiffs, on the other hand, would suffer only a short delay in taking these depositions which could be taken upon the termination of any criminal proceeding. There is therefore, little prejudice to the plaintiffs and much danger to Petitioners.

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[19] *Hartley Pen Co. v. District Court*, 287 F.2d 324, 327 (9th Cir. 1961); *La Buy v. Howes Leather Co.*, 352 U. S. 249 (1957); *Roche v. Evaporated Milk Association*, 319 U. S. 21 (1943).

In such circumstances, in a situation rife with constitutional implications and overtones, the failure to stay the taking of these depositions, constitutes an abuse of discretion. Other federal courts, when confronted with this problem, have had little difficulty in formulating the proper test.

The case of *Paul Harrigan & Sons v. Enterprise Animal Oil Co.* (E. D. Pa. 1953), 14 F.R.D. 333, clearly establishes that Petitioners' motion for a protective order should have been granted. In the *Harrigan* case a federal Grand Jury indictment had been returned charging seventeen defendants with violations of the federal antitrust laws. The plaintiff's complaint in the *Harrigan* case named as defendants fifteen of the seventeen, and the violations it alleged were substantially the same. The plaintiff noticed the depositions of four of the indicted individuals and propounded interrogatories. The individuals moved for a protective order under Rule 30(b). The court granted the motion and ordered that discovery "*will be postponed until the termination of the criminal action.*"

> "To compel discovery under such circumstances would contravene rights guaranteed by the Fifth Amendment to the individual defendants."
>
> *Paul Harrigan & Sons v. Enterprise Animal Oil Co.*, 14 F. R. D. 333, 335.

A similar result was reached in *National Discount Corp. v. Holzbaugh* (E. D. Mich., 1952) 13 F.R.D. 236.

Conclusion.

The Court of Appeals for the Ninth Circuit has, arbitrarily and without discussion, decided important Constitutional questions adversely to Petitioners. It has also sanctioned a departure from the ordinary and accepted course of judicial proceedings. For these reasons, as well as the others set forth above, the writ of certiorari sought herein should be granted.

Respectfully submitted,

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APPENDIX.

[Title of Court and Cause.]

Order Denying Motions to Stay Discovery.

Defendants United Concrete Pipe Company, American Vitrified Products Company, American Pipe and Construction Company and Pipe Linings, Inc., having moved to stay discovery, on September 9, 1963, and the Motions to dismiss or strike having been argued on October 14, 1963, John J. Hanson and Irwin F. Woodland, Esqs., of Gibson, Dunn & Crutcher, Esqs., appearing for the Defendants United Concrete Pipe Company and American Vitrified Products Company, and William McD. Miller, Esq., of Hill, Farrer & Burrill, Esqs., appearing for the Defendants American Pipe and Construction Company and Pipe Linings, Inc., and Gordon F. Hampton and Don T. Hibner, Esqs., of Sheppard, Mullin, Richter & Hampton, Esqs., appearing for the Defendant Concrete Conduit Company, a Division of Martin-Marietta Corporation, and Joseph F. Brodley, Esq., of Richards, Watson & Hemmerling, Esqs., appearing for the Defendant Centriline Division of Raymond International, Inc., and Richard D. Barger and George E. McGill, Esqs., of Meserve, Mumper & Hughes, Esqs., appearing for the Plaintiff and Respondent, and the Court having made its Order on October 21, 1963, denying the Defendants' Motions to dismiss and strike, and the Court being fully advised in the premises:

It Is Ordered, Adjudged and Decreed that the Motions of the Defendants United Concrete Pipe Company, American Vitrified Products Company, American Pipe and Construction Company and Pipe Linings, Inc.,

to stay discovery in the above matter be, and they hereby are denied;

It Is Further Ordered, Adjudged and Decreed that the depositions of Loyd Earl, set for November 12, 1963; Richard I. Young, set for November 13, 1963; George L. Curtis, set for November 14, 1963; Robert Edwards, set for November 15, 1963; and Elliott E. Brainard, set for November 18, 1963 at 10:00 o'clock A.M., on said respective dates, at Suite 700, 612 South Flower Street, Los Angeles, California, shall convene and commence upon those dates."

Dated: This 1st day of November, 1963.

/s/ Leon R. Yankwich
Judge of the United States District Court

[Title of Court and Cause.]

Order.

The defendants having applied ex parte for an order setting a date for hearing on motion for a protective order under Rule 30(b), F.R.C.P., regarding certain depositions; and to stay depositions until the above-mentioned motion can be heard; and shortening time; or in the alternative, for an ex parte order staying the taking of certain depositions ordered to be taken by an order of this court filed November 1, 1963, pending the filing with and the consideration by the Court of Appeals for the Ninth Circuit of the Petition for Mandamus; and

The Court being fully advised in the premises, and having heard from Richard D. Barger, Attorney for

Plaintiffs, John J. Hanson of Gibson, Dunn & Crutcher, and William McD. Miller, Attorneys for Defendants; and good cause appearing therefor,

Now, Therefore, It Is Hereby Ordered that each of the above-mentioned motions be, and the same is, hereby denied.

Dated: Los Angeles, California, this 4th day of November, 1963.

Peirson M. Hall,
Chief Judge, U. S. District Court

[Title of Court and Cause.]

Order on Motion for Leave to File Petition for Writ of Mandamus, Etc., and Motion for Stay.

At a Stated Term, to wit: The October Term 1963, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City of Los Angeles, in the State of California, on Thursday the seventh day of November in the year of our Lord one thousand nine hundred and sixty-three.

PRESENT: Honorable J. Warren Madden, Judge, U. S. Court of Claims; Honorable James R. Browning, Circuit Judge; Honorable Ben C. Duniway, Circuit Judge.

The motion of petitioners, this day filed, for a stay pending determination of application for writ of mandamus and prohibition, and the motion of petitioners for leave to file petition for writ of prohibition and for writ of mandamus having been filed.

Mr. John J. Hanson argued for the petitioners in support of said motion for stay, and Mr. Richards D. Barger, argued for the respondents and real parties in interest, and in opposition to said stay, which the Court thereupon Ordered submitted for consideration and decision.

On consideration thereof, It Is Further Ordered that the motion for stay be, and hereby is denied.

It Is Further Ordered that the motion for leave to file petition for writ of prohibition and for writ of mandate be, and hereby is denied.

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IN THE

Supreme Court of the United States

October Term, 1963
No. 682

AMERICAN PIPE AND CONSTRUCTION COMPANY, a California corporation, ROBERT V. EDWARDS, ELLIOTT BRAINARD, UNITED CONCRETE PIPE CORP., a California corporation, LLOYD EARL, RICHARD I. YOUNG, and GEORGE L. CURTIS,

Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, THE HONORABLE PEIRSON M. HALL, THE HONORABLE LEON R. YANKWICH, Judges of the United States District Court for the Southern District of California, Central Division, BATRIS W. PEROVICH, NORTHWEST PIPE LININGS, a Oregon corporation, and IN-PLACE LININGS, INC., a Texas corporation,

Respondents.

Answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents and the real parties in interest pray that this Honorable Court deny the Petition for Writ of Certiorari heretofore filed by the Petitioners in the above-named matter, and that the stay, made by this Honorable Court on November 9, 1963, and extended on December 4, 1963, in the within matter, terminate.

Opinions Below.

The opinions of the Honorable Leon R. Yankwich of November 1, 1963, and the Honorable Peirson M. Hall of November 4, 1963, of the United States District Court for the Southern District of California, Central Division, are set forth in the Appendix to the Petition of the Petitioners (Pet. App. pp. 1 and 2). The opinion of the United States Court of Appeals for the Ninth Circuit of November 7, 1963, is also set forth in the Appendix attached to the Petitioners' Petition for Writ of Certiorari (Pet. App. p. 3).

Questions Presented.

(1) Have the constitutional rights of the Petitioners been abridged, more particularly the Fifth Amendment privilege against self-incrimination, *where the depositions of certain of the individual Petitioners have not yet been taken*, so as to determine whether or not any questions put to the individual Petitioners might tend to incriminate them?

(2) Can this Honorable Court, or any other Court in this matter, properly adjudicate the scope of the privilege against self-incrimination asserted by the individual Petitioners until questions have been put to them upon the taking of their depositions?

(3) Does the Fifth Amendment privilege against self-incrimination extend to these corporate Petitioners?

(4) Was there an abuse of discretion by the United States District Court for the Southern District of California and the United States Court of Appeals for the Ninth Circuit in denying the Petitioners' motions?

Statement of the Case.

The Respondents and real parties in interest herein, Inplace Linings, Inc., a Texas corporation, Northwest Pipe Linings, an Oregon corporation, and Batris W. Perovich are engaged in the business of the inplace rehabilitation of new and used steel and concrete pipe. In March and April of 1963, three private civil anti-trust treble damage actions were commenced by these Respondents in the United States District Court for the Southern District of California, Central Division, against, among others, the corporate Petitioners.[1] The depositions of the Respondents and the officers of the Respondents were then taken. These depositions consumed approximately four days. After the filing of a First Amended Complaint for treble damages, Motions to dismiss were filed by all of the Defendants. Thereafter, the Petitioners, United Concrete Pipe Corp. and American Pipe and Construction Company, and two other Defendants, American Vitrified Products Company and Pipe Linings, Inc., filed their Motions to stay discovery in the three civil anti-trust matters. All Motions came on for hearing on September 9, 1963, before the Honorable Leon R. Yankwich. The Petitioners at the time of the hearing on September 9, 1963, urged to the Court that the Motions to stay discovery should be granted on the basis that the Petitioners were then the subject matter of a Grand Jury investigation, investigating the concrete and coated steel pipe industries, and that the taking of any depositions would tend to

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[1] *Batris W. Perovich et al. v. Pipe Linings, Inc., et al.* (No. 63-278-Y); *Northwest Pipe Linings v. Pipe Linings, Inc., et al.* (No. 63-279-Y); and *Inplace Linings, Inc. v. Pipe Linings, Inc., et al.* (No. 63-321-Y).

incriminate the individual prospective deponents, the individual Petitioners herein (App. pp. 18-23).[2] At the time of the hearing, the Court in its remarks from the bench, indicated that notwithstanding the fact that depositions were taken, the individual deponents could assert their Fifth Amendment privilege at the time of the taking of the depositions [Rep. Tr. of hearing of September 9, 1963, p. 6, lines 23-45, and p. 7, lines 1-3 and 13-20].[3] The Court went on to say that it *would adjudicate which questions could properly be put to the deponents and which could not after the depositions were commenced of the prospective deponents and the questions put to them* [Rep. Tr. of hearing of September 9, 1963, p. 7, lines 23-25, and p. 8, lines 1-4].[4] On November 1, 1963, Judge Yankwich made his Order denying the Motions to stay discovery, and ordered that the depositions of Messrs. Earl, Curtis, Young, Edwards and Brainard be taken.[5] Contemporaneously with the execution of his Order of November 1, 1963, Judge Yankwich also made a Minute Order augmenting his Order of November 1, 1963, in

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[2]Reference herein to "App." is to the Appendix filed with the Court of Appeals for the Ninth Circuit on November 7, 1963, which Appendix has been certified to this Court as part of the record herein.

[3]The transcripts of the hearing of September 9, 1963, and November 4, 1963, have been certified to this Court as a part of the record herein.

[4]Counsel for Petitioners agreed with Judge Yankwich on this suggestion as one solution to the problem [Rep. Tr. of hearing of September 9, 1963, p. 8, lines 5-9].

[5]On October 21, 1963, Judge Yankwich rendered his decision denying the Defendants' Motions to dismiss. On October 24, 1963, pursuant to Rule 26, *Federal Rules of Civil Procedure*, the Plaintiffs noticed the taking of the individual Petitioners' depositions, commencing on November 12, 1963, and ending on November 18, 1963.

which Minute Order he ordered that discovery proceedings be resumed, pursuant to Rule 26 of the *Federal Rules of Civil Procedure* (See Minute Order of November 1, 1963, in "Proceedings Had in the United States Court of Appeals for the Ninth Circuit", certified by the Clerk of the Circuit Court and a part of the record herein). On November 4, 1963, the Petitioners again attempted to stay discovery by moving for a protective Order under Rule 30(b) of the *Federal Rules of Civil Procedure* (App. pp. 40-47).[6] These Motions were denied by the Honorable Peirson M. Hall on November 4, 1963 (App. pp. 75-76). Thereafter, on November 7, 1963, the Petitioners moved that the United States Court of Appeals for the Ninth Circuit make its Order granting them the right to file a Petition for Writ of Mandate, or in the alternative, a Stay pending a determination of the Circuit Court of their Application for Petition for Writ of Mandate. Both Motions were denied on November 7, 1963, by the United States Court of Appeals for the Ninth Circuit. On November 9, 1963, the Petitioners moved this Honorable Court to issue its Order staying the taking of the

[6]The principal reason the Petitioners advanced was the imminency of the action by the Special Grand Jury investigating the concrete and coated steel pipe industries. *In the Matter of the Investigation of the Concrete and Coated Steel Pipe Industries*, United States District Court for the Southern District of California (Case No. 941-Misc.). Judge Thurmond Clark had ordered the Grand Jury to indict or return a No-Bill by November 19, 1963 (App. p. 47, lines 27-32, and p. 56, lines 7-24). The United States Court of Appeals for the Ninth Circuit in the case of *United States v. United States District Court et al.*, No. 18,995, by its Order of November 15, 1963, ordered Judge Clark to show cause why his Orders concerning the Grand Jury should not be vacated and set aside. On November 19, 1963, Judge Clark vacated all of his Orders. On December 16, 1963, control of the Grand Jury was transferred to Chief Judge Peirson M. Hall

depositions of the individual Petitioners pending their filing a Petition for Writ of Certiorari. This Application was granted by Mr. Justice William O. Douglas on November 9, 1963, and pursuant to an extension requested by the Petitioners, the Petitioners were given to and including December 23, 1963, to file their Petition for Writ of Certiorari. The Petition for Writ of Certiorari is now on file with this Honorable Court.

Reasons for Denying the Granting of the Writ.

The most important reason, these Respondents feel, for this Honorable Court to deny the Petitioners' Petition for Writ of Certiorari is that at the present time no constitutional rights of the individual Petitioners have been abridged. What these Petitioners are asking this Honorable Court to do, is to pre-judge that all questions put to any individual deponents, whether these individual Petitioners or any other deponent in the employ of the corporate Petitioners, would tend to incriminate those persons. What the Petitioners overlook is the fact that certain of these individual Petitioners and many prospective deponents have already been granted immunity pursuant to the immunity sections of the anti-trust laws of the United States, 15 USCA 32 (App. pp. 101-105, 126-127 and 130-134), and that the scope of immunity granted to these individuals is not narrow, but covers the same material as the three civil anti-trust actions. *These Respondents urge that the correct time to adjudicate the nature of Fifth Amendment privilege against self-incrimination of the individual Petitioners is not now, but at the time that questions are put to these individuals in order to then determine the nature of the question and the status of the person to whom it is put.* If the con-

tentions as advanced by the Petitioners are correct, this Court could impose an indefinite blanket protection upon all persons involved in these matters regardless of their status and regardless of the questions put to them. Not only would this carte blanche obscure the real issues of the litigation, but it would prohibit the orderly process of discovery pursuant to the *Federal Rules of Civil Procedure* in these matters. *The time to correctly view the posture of any deponent is not in advance of the taking of his deposition, but at the time the questions are put to him.* Secondly, these corporate Petitioners herein seek to avail themselves of the Fifth Amendment privilege against self-incrimination, a constitutional privilege to which they are not entitled. Lastly, Respondents urge that there has been no showing of an abuse of discretion by the District Court and the United States Court of Appeals for the Ninth Circuit in correctly denying the Motions of the Petitioners to stay discovery.

(1) The Privilege Against Self-Incrimination Must Be Analyzed in Light of Specific Questions Put to the Deponent.

The Petitioners are seeking to have this Court adjudge that an individual may refuse to attend a deposition in a civil proceeding and that the Fifth Amendment privilege against self-incrimination may be imposed by a deponent prior to the time that any incriminating question is asked or before any incriminating matter confronts him. The basis for the Petitioners' contentions is that there is now pending in the United States District Court for the Southern District of California, an investigation by the Grand Jury, investigating the concrete and coated steel pipe industries.

although to date there have been no claims that the Petitioners have violated any laws of the United States. Notwithstanding this fact, the Petitioners are now making the contention that the pendency of the Grand Jury and the imminency of the Grand Jury's indictment, gives rise to the Fifth Amendment privilege against self-incrimination prior to the time that any depositions are taken.

In addition, the Petitioners seek, with a broad stroke of the pen and a narrow view of the facts, to assert that those persons given immunity by the Grand Jury by virtue of their testimony, are subject to incrimination, in that the scope of the immunity granted by the Grand Jury is untested. There is no question that appearing pursuant to a subpoena in an antitrust investigation and testifying before a Grand Jury automatically gives the witness the immunity granted under 15 USCA 32. *United States v. Monia* (S. Ct., 1942), 317 U. S. 424. The Petitioners contend that the scope of the immunity is narrow in its effect. Quite the contrary, the scope of the immunity granted by 15 USCA 32 is quite broad. This Court, in *Counselman v. Hitchcock* (S. Ct., 1892), 142 U. S. 547, held that the Immunity Act of February 25, 1868, 15 Stat. at L. 37, Chap. 13, was unconstitutional because the Act prevented the use of evidence against witnesses, but it did not preclude prosecution of the witness as a result of information gained from the testimony. This Court indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed this privilege. Thereafter, Congress passed the Act of February 11, 1893, 27 Stat. at L. 443, Chap. 83, which Act broadened the immunity provisions of the original Interstate Commerce Act. The Act of February 11, 1893,

became the model for immunity provisions which were enacted at various times up to and including the enactment of the antitrust Immunity Act of February 25, 1903, 15 USCA 32, which Act reads as follows:

"No person shall be prosecuted or be subjected to any penalty or forfeiture *for or on account of any transaction, matter, or thing, concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or* supplemental thereto, and Sections 8-11 of this title: * * *" (Emphasis added).

The antitrust Immunity Act of February 25, 1903, does not require a witness to claim his constitutional privilege as a condition precedent to the earning of immunity. *United States v. Monia, supra; Hale v. Henkel* (S. Ct., 1906), 201 U. S. 42; and *United States v. Armour & Co.* (D. C., Ill.; 1906), 142 Fed. 808.

The Petitioners in support of their contentions assert that the pending investigation by the Grand Jury and the three pending civil antitrust matters cover in their scope the same matters. This contention is quite true. Therefore, the scope of the immunity granted by the Grand Jury in furtherance of its investigative process is identical with any facts which would be the basis for relevant questions put to these individual Petitioners upon the taking of their depositions. To those persons who have been granted immunity by the Grand Jury there can be no question that the answers in response to questions concerning these private civil antitrust matters would not tend to incriminate them. *Knapp v. Schweitzer* (S. Ct., 1958), 357 U. S. 371; *Feldman v.*

United States (S. Ct., 1943), 322 U. S. 487; and *United States v. Murdock* (S. Ct., 1931), 284 U. S. 141.

The Petitioners herein are seeking to have this Honorable Court impose a blanket privilege upon all prospective deponents by pre-judging that all testimony would tend to incriminate the individual deponents, including the individual Petitioners herein, although some of the Petitioners have been given immunity in matters that are the same subject matter as these civil antitrust matters. This, the Respondents contend, is contrary to the orderly administration of the discovery process as provided in the *Federal Rules of Civil Procedure*.

In *Independent Productions Corp. v. Loew's Inc.* (S. D., N. Y., 1958), 25 Fed. Rules Serv. 26b. 31, Case 2, in a civil antitrust action, the defendants commenced a pre-trial examination of the president and sole shareholder of the plaintiff corporation. In the course of the examination, the deponent refused to answer a number of questions or group of questions. One of the principal bases for the refusal of the deponent to answer was the imposition of the privilege against self-incrimination as granted by the Fifth Amendment of the Constitution of the United States. The Defendants moved for an order under Rule 37(a) of the *Federal Rules of Civil Procedure* to compel the deponent to answer the questions under threat of contempt. The plaintiffs cross-moved, pursuant to Rule 30(b) of the *Federal Rules of Civil Procedure*, for an order sustaining the plaintiffs' objections to the questions and directing that the defendants not inquire into the subject matter of those questions in *all future* discovery proceedings. The Court denied the plaintiffs' motions to

limit the scope and extent of all future questions and stated as follows:

> "So far as concerns matters other than the listed questions actually propounded to Mr. Lazarus, plaintiffs' motion to limit the scope of defendants' examination [F.R.C.P. Rule 30 (b)] is premature. *Any claim of privilege or irrelevancy should be raised by plaintiffs' objection to specific questions when asked. The court will not, in advance, pass upon anticipated questions.* See Jacobowitz v. Kremer, 7 F.R.D. 110 (S.D.N.Y. 1946); Smith v. Crown Publishers, Inc., 14 F.R.D. 514 (S.D. N.Y. 1953); Brockway Glass Co., Inc., v. Hartford-Empire Co., 36 F. Supp. 470 (W.D.N.Y. 1941); Moore, Federal Practice, ¶30.09 (2d ed. 1950)." (Emphasis added).
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> *Cf. O'Keefe v. Shaughnessy* (N.D., N.Y., 1950), 95 F. Supp. 900.

In the case of *United States v. Matles* (2d Cir., 1957), 247 F. 2d 378, the Court was confronted with the problem of whether or not the defendant in a civil denaturalization proceeding must take the stand and be sworn in an oral deposition in the matter, where the government sought to take the deposition of the defendant pursuant to Rule 26 of the *Federal Rules of Civil Procedure*. The defendant refused to appear for the examination and refused to be sworn, alleging that appearing as a witness might tend to incriminate him. The defendant was held guilty of contempt by the District Court and the Circuit Court upheld the District Court's finding that in a civil action a party to the action must appear and be sworn, notwithstanding the fact that he may impose the privilege against self-in-

crimination to questions when put to him. The Court was also confronted with the problem of what questions could be put to the deponent defendant once his deposition was taken. The Court, in a concurring opinion of Judge Lumbard, at page 383, held that it could not judge in advance whether or not any incriminating questions would be asked, and stated:

> *"Finally, we cannot say in advance of the examination whether any non-incriminatory question may be asked. Rule 26(b) of the Federal Rules of Civil Procedure was designed to permit broad and searching examination of all matters which would assist a party in discovering evidence.* Thus Rule 26(b) provides:
>
> "'Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.'
>
> "This language is clearly designed to be broad enough to cover almost anything that will help the examining party to discover any leads to evidence. *In practice the district court is not asked to rule*

on the availability of the privilege to refuse to answer until a number of questions have been asked and refused. The district court is thus in a position to determine the incriminatory nature of the question or questions in the context of the whole case and the nature of the information sought to be elicited. Until that moment, it cannot be known which of the many possible questions will require answers which may be incriminatory. Thus it seems to me that in all civil cases as long as it is possible that one question may be answered, the spirit of the Federal Rules requires that the witness be sworn and the district court must make the determination whether particular questions must be answered, and not the party himself." (Emphasis added).

The position of the Respondents on the claim of the individual Petitioners' right not to be deposed is best illustrated by the language of the concurring opinion of Judge Lumbard in the case of *United States v. Matles, supra*, at page 382:

"The issue of whether Matles may refuse to be sworn as a witness is of such importance in the administration of justice in all civil cases that I take this occasion to make my own position clear. *On reason and precedent, Matles, like any other party or witness in a civil suit, and not under indictment on similar charges, may not refuse to be sworn as a witness."*

* * * * *

"In any event, this defendant, not being under indictment on charges similar to those at issue in this denaturalization proceeding, *is not in a posi-*

tion similar to that of an accused in a criminal prosecution. While it cannot be said that the denaturalization defendant faces no dangers, they are different in nature and degree from those faced by an accused, *and are such as must be faced by any defendant in a civil suit if our methods of seeking and finding the facts are to function fairly and effectively.*

"The danger underlying the accused's right not to take the stand and to be sworn is that a refusal by him to answer might emphasize in a particularly prejudicial way that the accused considers certain questions incriminatory and the jury may consider his refusals to answer as the equivalent of damaging answer. See 8 Wigmore § 2268 (3d ed. 1940); United States v. Scully, 2 Cir., 1955, 225 F. 2d 113, 115-116, certiorari denied 1955, 350 U. S. 897, 76 S. Ct. 156, 100 L. Ed. 788; Grunewald v. United States, 77 S. Ct. 963.

"But no such prejudice attaches to the refusal to answer questions at an examination before trial in a civil case. * * *"

"Moreover, as in any civil action, the denaturalization defendant has notice in advance regarding the issue and the assistance of counsel at every step of the way, for every question. *He can claim his privilege as to each alleged incriminatory question as it is asked. This is all the protection which is necessary.*

"I do not believe that the possibility of inadvertent waiver, which is reduced to a minimum where counsel is present, justifies the extension of the privilege in violation of the rights of the other

*party and in derogation of the fact-finding policy of the Federal Rules of Civil Procedure. No court has yet accepted or even suggested such a doctrine. * * *"*

"Furthermore, fear of inadvertent waiver would justify a refusal to be sworn in any civil case where the main charge could also be ground for criminal prosecution, e.g., a suit in negligence where the charge is reckless or drunken driving or a suit for conversion or embezzlement. In each case it could be argued that most questions could be incriminatory and that there is a danger that a party may waive his privilege and be forced to answer a series of incriminatory questions. I doubt that anyone would be willing to allow such a frustration of the fact-finding process in these other contexts, but the logic of such reasoning is not limited to denaturalization—it would extend to any civil action where the main charges could be the basis of a criminal prosecution. I find it hard to believe that this far reaching result is at all necessary, especially in view of the defendant's existing protection." (Emphasis added).

Cf. Dissenting opinion of Mr. Justice Frankfurter in *United States v. Monia, supra,* at page 433.

The logic and reasoning of Judge Lumbard are compelling, and the facts are not different save this case involves civil actions in antitrust, whereas the case of *United States v. Matles, supra,* involved a civil matter in naturalization. If these individual Petitioners feel that any question would tend to incriminate them, they should be sworn and deposed and the questions put to

them. They may then assert their constitutional privilege and the matter may be then taken to the District Court for an adjudication by the Judge as to whether or not the questions would tend to incriminate these individual deponents. Thereafter, if the deponents feel that the decision of the District Court is in error, they have remedies available to them, but these remedies do not, at this time, include the right to have this Honorable Court pre-judge that their Fifth Amendment rights against self-incrimination has been abridged until this Court has specific facts before it.

(2) Corporate Imposition of the Fifth Amendment Against Self-Incrimination.

An examination of the Petition for Writ of Certiorari in this matter shows that two of the seven Petitioners are corporations, to wit, American Pipe and Construction Company and United Concrete Pipe Corp. Although not stated directly in the Petition, these corporate Petitioners by implication, assert that they, as well as the individual Petitioners, are entitled to the Fifth Amendment privilege against self-incrimination. Clearly, this is contrary to the law as enunciated by this Court on many occasions. The Fifth Amendment privilege does not protect a corporation or its officers against self-incrimination for the purposes of discovery under the *Federal Rules of Civil Procedure*. *Oklahoma Press Pub. Co. v. Walling* (S. Ct., 1945), 327 U. S. 186; *United States v. Bausch & Lomb Optical Co.* (1943), 321 U. S. 707; *Wheeler v. United States* (S. Ct. 1913), 226 U. S. 478; *Wilson v. United States* (S. Ct., 1911), 221 U. S. 361; and *Hale v. Henkel* (S. Ct., 1906), *supra*.

(3) The Petitioners Herein Have Shown No Abuse of Discretion by the District Court.

Implicit in the contention of the Petitioners herein is their claim that Judge Yankwich and Judge Hall abused their discretion in denying the Motions of the Petitioners to stay discovery. As the Respondents have heretofore shown, Judge Yankwich, at the hearing on September 9, 1963, took great pains to point out to the Petitioners that notwithstanding his denial of their Motions to stay discovery, that denial would not preclude the Petitioners from asserting the privilege against self-incrimination when their depositions were taken. [Rep. Tr. of hearing of September 9, 1963, p. 6, lines 23-45 and p. 7, lines 1-3 and 13-20]. In addition, Judge Yankwich pointed out to Counsel for the Petitioners that there was no stigma attached to the assertion of the Fifth Amendment privilege by these individual Petitioners [Rep. Tr. p. 7, lines 13-20]. Counsel for the Petitioners concurred in that statement [Rep. Tr. p. 7, lines 21-22].

The facts of the within case are identical to those in the case of *Meyer v. Brooks* (S. Ct., Tex., 1962) 360 S. W. 2d 518. In that case Meyer was the Sheriff of Jefferson County, Texas. The State of Texas felt that Sheriff Meyer had been guilty of some extra-curricular activities while in office, and filed five indictments in the State Court against him, the first two charging bribery, and the last three charging false statements made in Sheriff Meyer's report of election campaign expenses and contributions. Subsequent to the filing of the five criminal indictments against Sheriff Meyer, the State of Texas on relation of certain citizens brought a civil action for the removal of Sher-

iff Meyer from the office of Sheriff of Jefferson County. The State then filed a notice in the civil action for the taking of Sheriff Meyer's deposition. The Defendant Meyer then filed a notice of motion to quash the taking of his deposition under Rule 180b of the *Texas Rules of Civil Procedure*, which Rule is substantially the same as Rule 30(b) of the *Federal Rules of Civil Procedure*. The trial court overruled the defendant's motion without prejudice to his right to assert his constitutional privilege against self-incrimination by refusing to answer any question which might tend to incriminate him. Meyer then filed a Petition for Writ of Mandamus in the Texas Supreme Court to require the trial judge to revoke his order overruling the motion. The Texas Supreme Court, in denying Meyer's Petition for Mandamus expressly distinguished the cases of *Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co., Inc.* (E. D., Pa., 1953), 14 F.R.D. 333; *National Discount Corp. v. Holzbaugh* (E. D., Mich., 1952), 13 F.R.D. 236, and *United States v. Bridges* (N.D., Cal., 1949), 86 F. Supp. 931, cases cited by the petitioners in their Petition for Writ of Certiorari, and said:

> "The decisions relied upon all issue from the United States District Court. So far as we can ascertain, the point has not been tested on appeal. * * * Actually, the only authoritative construction, we think, given by the Federal Courts to Rule 30(b) is that the trial judge is vested with judicial discretion in acting upon a motion to stay the taking of the deposition of a party and before his ruling may be set aside there must be shown *a clear abuse of discretion.* * * * Since

the question of whether the taking of a deposition be stayed or not, lies within the judicial discretion of the trial judge, it cannot be said with any degree of certainty that, if the trial judge had not granted the stay in Harrigan v. Enterprise and National Discount v. Holzbaugh, the Federal Courts would have held that the failure to do so would amount to abuse of discretion. Moreover, in the case here the factual situation differs. As pointed out above, among the various grounds upon which removal of the Sheriff is sought only on one, namely, bribery has he been indicted, and Rule 30(b) even as applied by the Federal District Courts would have no application to the remaining charges." (Emphasis added).

In the case of *National Bondholders Corporation v. McClintic* (D.C., 1938), 99 F. 2d 595, the Court, in discussing the matter of judicial discretion in the matter of the taking of depositions, stated as follows:

"* * * The determination of the existence of a sufficiency of the cause against taking the depositions in this case was for the district judge in his judicial discretion. On this application for mandamus to reverse his ruling on an interlocutory matter, we cannot properly substitute our judgment for his as to the determination of what constituted good cause for the order even though if and when the case should ultimately be here on appeal, the Court may be of a different opinion."

In the case of *Landy v. United States* (5th Cir., (1960), 283 F. 2d 303, the Circuit Court affirmed a judgment of the trial court requiring Landy to respond

to an administrative subpoena of the Internal Revenue Service, and states:

> "We hold that the trial court correctly decided that it could not quash the subpoena on the general allegation that it was intended for purposes other than those for which it purported to issue, and that it might result in questions which the subpoened witness could constitutionally refuse to answer. *The privilege of the fifth amendment must be exercised in connection with precise questions, and not as a general excuse for refusing to appear in response to subpoena.*" (Emphasis added).

For the reasons herein stated, the Respondents feel that the Petitioners cannot show that at the present time the Court has before it any matters prejudicial to the rights of the individual Petitioners, and they have not sustained the burden of showing that the District Court, more particularly Judge Yankwich and Chief Judge Hall, have abused their judicial discretion in denying the Motions of the Petitioners to stay discovery in the three civil antitrust matters. Quite the contrary, Judge Yankwich, in his remarks at the hearing on September 9, 1963, took great pains to point out to the Petitioners that the individual Petitioners when they were deposed could assert their Fifth Amendment privilege against self-incrimination if and when the questions were put to them. An examination of the transcript of the hearing before Chief Judge Hall shows that Judge Hall was not disposed to disturb the ruling of Judge Yankwich. [Rep. Tr. of hearing of November 4, 1963, p. 11; lines 8-9]. Furthermore, Judge Hall reiterated the statement made by Judge Yankwich

on September 9, 1963, that the deponents could refuse to answer. [Rep. Tr. of hearing of November 4, 1963, p. 12, lines 21-22].

At the hearing on November 7, 1963, the Circuit Court of Appeals for the Ninth Circuit, in its remarks to Counsel for the Petitioners during oral argument on their Application to file a Petition for Writ of Mandamus, expressly indicated to Counsel for the Petitioners that any ruling by the Circuit Court at that time for the mere taking of the depositions of the individual Petitioners, would not constitute a waiver by them of their Fifth Amendment privilege against self-incrimination, which privilege could be asserted by them at a time subsequent when their depositions were taken.

Conclusion.

The United States District Court for the Southern District of California and the Court of Appeals for the Ninth Circuit have not arbitrarily decided important constitutional questions adversely to these Petitioners. Quite the contrary, those Courts have taken great pains to point out to these Petitioners that at the proper time and place they can assert their Fifth Amendment privilege when the particular questions are put to the individual deponents taking into consideration the status of the deponents, that is to say, whether or not they have been granted immunity, and the nature of the questions put to them. The Petitioners ask this Honorable Court to pre-judge that each and every question put to each and every deponent would tend to incriminate him, and that the individual Petitioners have the right that they not be deposed in these three civil antitrust matters. This, the Respondents contend is

contrary to the established law as adopted by this Court and by the lower Federal Courts, and is contrary to the philosophy of discovery as enunciated by the *Federal Rules of Civil Procedure*. For these reasons, as well as the others set forth, the Respondents and Real Parties in Interest respectfully submit and request that the Petition for Writ of Certiorari sought herein be denied.

Respectfully submitted.

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IN THE

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Respondents.

REPLY OF PETITIONERS.

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IN THE

Supreme Court of the United States

October Term, 1963
No. 682

AMERICAN PIPE AND CONSTRUCTION COMPANY, a California Corporation, ROBERT V. EDWARDS, ELLIOTT BRAINARD, UNITED CONCRETE PIPE CORP., a California Corporation, LLOYD EARL, RICHARD I. YOUNG, and GEORGE L. CURTIS,

Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, THE HONORABLE PEIRSON M. HALL, THE HONORABLE LEON R. YANKWICH, Judges of the United States District Court for the Southern District of California, Central Division, BATRIS W. PEROVICH, NORTHWEST PIPE LININGS, a California Corporation, INPLACE LININGS, INC., a California Corporation,

Respondents.

REPLY OF PETITIONERS.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Pursuant to the practice of this Court, Petitioners will not reply point by point to the contentions of Respondents. Petitioners will merely bring to the attention of this Court certain facts which serve as a further showing that the commencement of criminal proceedings against Petitioners is an immediate and overwhelming threat. Accordingly, since Respondents themselves admit that it is "quite true" that Respondents' pending civil antitrust actions cover the same matters which

form the basis for the pending Grand Jury investigation (Answer to Petition, p. 9), positions which Petitioners are compelled to take in these civil antitrust actions must trammel Petitioners in the related criminal proceedings.

Grand Jury Proceedings.

A special Grand Jury, now in its sixteenth month, continues its investigation into the concrete and coated steel pipe industries in the western United States. The corporate Petitioners are members of that industry, and the individual Petitioners are key officers of the corporate Petitioners. Caught between the Grand Jury investigation and the private civil antitrust actions being pushed by Respondents, Petitioners have sought in several ways to be assured of a fair and orderly opportunity to defend themselves. Before this Court now, the individual Petitioners seek such an opportunity on the basis of the guarantee of the Bill of Rights against involuntary self-incrimination[1]; in the circumstances, all Petitioners have also turned to principles of due process to assure them this opportunity. These two distinct claims raise Constitutional questions of importance which this Court should consider.

Petitioners have also sought such assurance by insisting upon their right to expeditiousness on the part of the Government in bringing criminal proceedings. More particularly, they have urged that the special Grand Jury, impaneled for the purpose of this investigation, now has full information on which to act and that delay on its part, in returning either indict-

[1]Nowhere have the corporate Petitioners herein laid claim to a privilege against self-incrimination for corporate matters as such. The repeated (Answer to Petition, pages 2, 7, 16) assertions of Respondents to the contrary are in error.

ments or no-bills, constitutes a serious abuse of its inquisitorial powers. The various steps taken by Petitioner and others in respect to the Grand Jury have been set out in the briefs filed in this Court by Petitioners,[2] and by Respondents.[3] The most recent result of Petitioners' efforts was a hearing on Monday, December 16, 1963 before the Honorable Peirson M. Hall, Chief Judge of the United States District Court for the Southern District of California. Petitioners believe that certain statements made at this hearing so clearly show the reality of the danger confronting them that they have set forth at length, as an Appendix hereto, portions of the transcript of that hearing. These portions of the transcript show, by the candid admission of counsel for the Antitrust Division of the Department of Justice, the following:

1. The investigation of the concrete and coated steel pipe industry has been extremely comprehensive and extensive, the Grand Jury having heard more than sixty witnesses and having examined "27 file drawers full of documents."

2. Except for a small number of minor witnesses testifying solely as to the involvement of interstate commerce, the investigation by the Grand Jury was completed at the time of the hearing.

3. Subject to review in Washington, the Antitrust Division of the Justice Department is prepared to recommend that the Grand Jury return not "just one," but "several," indictments arising out of the investigation.

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[2]Pages 7-8.
[3]Page 5.

4. Final action by the Grand Jury and the return of indictments should be completed by the end of February.

Petitioners submit that these statements made in open court by responsible representatives of the United States underline the high probability and extreme imminence of criminal prosecution. By the time that this Court acts on this Petition for a Writ of Certiorari, or shortly thereafter, it is extremely likely that indictments shall have been returned.

Conclusion.

The issues here presented to the Court arise from the *near certainty* felt by these Petitioners that their rights as criminal defendants may be compromised through their unwilling involvement *at this time* with Respondents' claims for monetary damages. The harm to Petitioners may well be irreparable; Respondents have never shown that they will be damaged at all by the limited *delay* in discovery proceedings sought by Petitioners. Instead, Respondents have been absolute in their demand that discovery proceedings go ahead in total disregard[4] of the threat to Petitioners of directly

[4]Respondents make much of the possible immunity from criminal prosecution available to two out of the five of the individual Petitioners. Respondents, however, have never offered to limit the taking of depositions to those of the individual Petitioners who may claim such immunity. But more than this, Respondents ignore the claims of all Petitioners to relief arising out of considerations of due process. Instead, Respondents offer only a dubious assertion as to the scope of the immunity and a flippant dismissal of the vexed problem of the protection accorded by the Fifth Amendment against self-incrimination under *state* law (Answer to Petition, pages 9-10).

related criminal proceedings. The result is that Respondents may gain wholly improper advantages by reason of the pending prosecution. The dangers confronting Petitioners are all too real; their contention that the Constitution accords them some relief from these dangers demands full consideration by this Court.

Respectfully submitted,

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APPENDIX.

The following are portions of the transcript, being pages 30-35 and 37-39 thereof, of the hearing before the Honorable Peirson M. Hall, Chief Judge of the United States District Court, Southern District of California, Central Division, held at Los Angeles, California on Monday, December 10, 1963 in the Matter of Investigation of the Concrete and Coated Steel Pipe Industries by the Grand Jury (Special) impaneled October 4, 1962. Mr. Whitehouse, Foreman (United States District Court, Southern District of California, Central Division, Misc. 941):

THE COURT: Mr. Disney [Attorney for the Justice Department], you are on some kind of time schedule, I suppose. What is your time schedule now? When do you anticipate you will conclude this matter before this grand jury?

MR. DISNEY: If your Honor please, our time schedule calls for us to submit to our head office in Washington, which scrutinizes all antitrust indictments, the matters or the various indictments which we hope to have this grand jury return by the end of January.

Now this does not involve just one [indictment] but it involves several [indictments], sir, and I can state that so far as our office is concerned—I don't know whether I should say it or not—but that is the time schedule.

THE COURT: The thing that I am concerned with is when will you conclude the matter with the grand jury? By the middle of February?

MR. DISNEY: If your Honor please, I have no reluctance to accepting an order that you—

THE COURT: I am not suggesting any order, and I will say candidly to counsel that I am not going to discharge the grand jury because the grand jury has before it other matters with which these people are not concerned, and I am not thus going to frustrate the prosecution of the criminal laws involving other crimes by yielding to the requests or demands of one group of people.

MR. DISNEY: I would like to have to the end of February, which would give our Washington office the one month in which to analyze and study this.

According to our procedure I do not have the authority that Mr. Whelan has; we must prepare an extensive factual memorandum, we then send forward our proposed indictments, our theories of law and the factual memorandum.

In Washington they exercise their judgment as to whether our theories are correct and as to whether our evidence sustains the indictments which we ask permission to recommend to the grand jury, and since all of our matters apply to large defendants who can be expected to appeal to the Supreme Court or to the Court of Appeals in a criminal case, frequently they have to clear them with the Solicitor General's office too, so I would say it would be the end of February. My office will be finished by the end of January.

MR. MILLER [Counsel for American Pipe and Construction Co.]: Your Honor please, may I be heard? My name is William Miller of Hill, Farrer & Burrill.

THE COURT: Yes.

MR. MILLER: With respect to Mr. Disney's remarks concerning a careful investigation, we are en-

tirely in agreement with that. We urge that the proper function of the grand jury is to act as an inquisitorial body, to hear evidence as to whether a crime has been committed, and if there is probability that certain persons did it, and that is all. We feel that it is improper that a grand jury be used as an evidence collecting device. We feel that the Federal Bureau of Investigation is available to the Department of Justice or the United States Attorney, or whoever else needs it in the Government, to collect the evidence and that they should have the evidence before they bring the matter to the grand jury.

This matter has been pending before this grand jury for well over a year, which is six months beyond the term that apparently has been determined as the policy matter in the order that your Honor mentioned.

Insofar as the delay because of recommendations as to the internal policy of the Antitrust Division is concerned, in this very proceeding on September 17th the Antitrust Division filed an affidavit of Barbara J. Svedberg which set forth this same identical procedure, that a recommendation had to go to Washington together with the indictment, which is considered by the Antitrust Division, that it takes them about a month to consider it, and on the October 17th hearing again an affidavit was filed by Barbara J. Svedberg in this proceeding in which she states under oath that since September 17, 1963 she has pursued the investigation with continued diligence with the aid of Donald J. Fallon, an attorney recently assigned to assist with the investigation, and that she has forwarded to Washington certain recommendations with respect to some matters and is preparing to forward further recommendations on related matters.

Now apparently according to the affidavit of this person under oath recommendations were forwarded to Washington as early as October 17, 1963, which is almost two months ago, and yet their grand jury has failed to indict one single person.

These people have been under the threat of indictment for over a year. We insist that people who are target defendants for indictment have the same constitutional rights to a speedy trial and a speedy determination of their rights as a person who is actually on trial. We think that the processes of the grand jury has been abused in this instance and that the rights of the target defendants under the constitution have been abused.

That is the reason these motions were made, your Honor.

THE COURT: Would you have anything more to present to him, Mr. Hanson, than has already been presented?

MR. HANSON [Counsel for United Concrete Pipe Corp.]: No, sir, except to point out that since October 14th, with respect to the four companies that are represented by counsel here, there have been no further subpoenas, they have questioned no more individuals, they have been in each of our organizations, they start with the lowest level person who has any knowledge and they work up to the top, and leaving one or two individuals who they do not call, and sometimes they call them and do not use them, as in the case of Mr. Earl. We are just pointing out that since October 14th there has been no evidence from our point of view for any further need of information by witnesses or documents.

THE COURT: You do not anticipate producing any further witnesses before the grand jury?

MR. DISNEY: If your Honor please, we may have one or two or maybe a number of small witnesses for the purpose of interstate commerce, but I don't think there will be many, they won't be numerous, and I do not know what is planned there. I would say that this would be a matter for discussion with your Honor in chambers.

THE COURT: By the way, I will not interview Mr. Whitehouse [foreman of the grand jury] in camera about what is going on in the grand jury room or what the attitude of the grand jury is because nobody can be present when they vote and nobody can know how they vote, so I think it would be highly improper for me or any other judge to inquire of Mr. Whitehouse how the grand jury stood on this matter or whether or not they desired to be discharged.

MR. DISNEY: If your Honor please, on the first point I don't want to be misunderstood. I did not intend to suggest that you inquire of Mr. Whitehouse as to the attitude of the grand jury on this, which I believe also would be improper, what I did intend to suggest was that you might want to inquire of him whether he thought the attorneys for the department were fumbling or whether the case was complicated, whether the time consumed seemed well spent, and things of that kind.

THE COURT: Let me ask you some questions without disclosing anything that went on before the grand jury by way of testimony. How many witnesses did you present?

MR. DISNEY: I think—do you know how many witnesses were presented, Miss Svedberg [Counsel for the Justice Department]?

MISS SVEDBERG: Over 60.

THE COURT: Over 60?

MR. DISNEY: That is right.

THE COURT: And documents?

MR. DISNEY: How many documents did we receive?

MISS SVEDBERG: Your Honor, we have approximately 27 file drawers full of documents which it takes considerable time to examine, and this is a very complicated industry.

* * * *

THE COURT: I would like to say, however, I do not expect to use the sanctions of the court but I do believe that by the order which the court has signed here of September 16th, indicating that these matters should be concluded with dispatch, that the Antitrust Division here and in Washington should proceed as promptly as possible to the conclusion of this matter.

By the way, was this the case where Judge Yankwich refused to suppress some subpoenas and I followed his ruling?

MR. MILLER: Yes, your Honor.

MR. HANSON: Yes, your Honor. That is the case.

THE COURT: I can see the dilemma of defendants' counsel in connection with these matters where they have private antitrust suits pending.

I will state to counsel now that if upon notice you wish to renew that motion before me I will give it reconsideration.

MR. HANSON: Your Honor, as you may or may not know, we went to the Ninth Circuit on that and the Ninth Circuit did not reverse you and we now have gone to the Supreme Court and Justice Douglas granted a stay pending filing of a petition for certiorari, so that matter is now before the Supreme Court.

THE COURT: Well, it is stayed a little while then.

MR. HAMPTON [Counsel for ~~Martin~~ Marietta Corporation]: Your Honor, in that connection, may I say this, because it is a very pertinent subject overall to antitrust cases, but I do think it will come before your Honor as the Chief Judge, the possible composition of these discovery problems growing out of these cases, and it may be that your Honor will want to give further consideration to this problem.

THE COURT: The only reason this matter got before me is because I am calling all of Judge Yankwich's matters during his illness. If it is before some other judge—is that a low number case? Is that the first case filed?

MR. HAMPTON: Yes.

THE COURT: Does he have all of them?

MR. HAMPTON: Not all of them. He has three of them.

THE COURT: I see. I don't think there is anything further to come before the court. Court is adjourned.